

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

AGUSTIN JIMENEZ, JR.,

Defendant and Appellant.

D074180

(Super. Ct. No. FWV1504256)

APPEAL from a judgment of the Superior Court of San Bernardino County, Kyle S. Brodie, Judge. Affirmed.

Victoria H. Stafford, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Melissa Mandel, Meredith White and Mary Katherine Strickland, Deputy Attorneys General for Plaintiff and Respondent.

Agustin Jimenez attacked his wife and stepdaughter in the family's home. As a result, Jimenez was arrested and eventually convicted by a jury of multiple crimes related to the incident: Two counts of false imprisonment (Pen. Code, §236¹), making a criminal threat (§ 422, subd. (a)), vandalism (§ 594, subd. (a)), evading police (Veh. Code, § 2800.2, subd. (a)), domestic battery (§ 243, subd. (e)(1)) as a lesser included offense of inflicting corporal injury on a spouse (§ 273.5, subd. (a)), and misdemeanor child endangerment (§ 273a, subd. (a)) as a lesser included offense of felony child endangerment (§ 273a, subd. (a)). The jury also found Jimenez not guilty of assault with a deadly weapon (§ 245, subd. (a)(1)) and could not reach a verdict on a second count of the same crime. After trial, Jimenez admitted a prior serious felony conviction and the court imposed a total sentence of 12 years and two months, which included a five-year enhancement for the prior serious felony conviction under section 667, subdivision (a).

Jimenez contends his conviction for domestic battery must be reversed because the trial court failed to give a unanimity instruction for that offense. He also argues his conviction for felony false imprisonment must be overturned because the court did not provide an instruction concerning the lesser included offense of misdemeanor false imprisonment. We reject Jimenez's argument that a lesser included offense instruction was required by the evidence. And although we agree with him that the failure to give a unanimity instruction was error, we conclude the error was not prejudicial.

¹ Subsequent statutory references are to the Penal Code.

In addition, after our initial opinion affirming the trial court's judgment was filed, we granted Jimenez's petition for rehearing asserting he was entitled to relief based on recently enacted Senate Bill No. 1393. The legislation, which became effective on January 1, 2019, amends sections 667 and 1385 to give trial courts discretion to strike five-year prior serious felony enhancements. We agree with the parties that the new law applies retroactively to this case and, accordingly remand for the limited purpose of allowing the trial court to consider whether to strike the prior serious felony enhancement. The judgment is otherwise affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Jimenez and his wife Irma had been married for three years at the time the events giving rise to this case occurred. The couple had a confrontational relationship fueled by drug and alcohol use. Prior to this incident, Jimenez had attacked Irma regularly and had also assaulted Irma's daughter Alexa. According to Alexa, who was 16 years old at the time of this incident, the couple had been in an ongoing fight for over a month.

On the evening of November 13, 2015, Jimenez and Irma were arguing when Jimenez ripped Irma's shirt open, strangled her, and pushed her into a closet. Jimenez grabbed Irma by the hair as she pleaded with him to let her go. Irma eventually escaped from her husband and fled into Alexa's bedroom. Irma and Alexa put a bookcase and dresser in front of the bedroom door, and Irma slept with her daughter that night.

On the morning of November 14, 2015, Irma and Alexa woke up to banging and the smell of smoke. Jimenez had attempted to light the door to the bedroom on fire from the outside. When this failed, Jimenez went outside and threw an air conditioning unit

through the bedroom window. The unit landed on Irma's knees. Jimenez then went back inside and forced his way into the bedroom. Once inside, he screamed at Irma and Alexa, then went on a rampage destroying their property while they sat on Alexa's bed in fear. Jimenez broke the heels off Irma's shoes and threw the shoes and her clothing onto Alexa's bedroom floor. He destroyed family photos, broke Alexa's computer tablet with a metal curtain rod, and lit a piece of paper on fire in the room.

During Jimenez's rampage, Irma and Alexa tried to leave the room several times, but he prevented them from leaving. Jimenez stood between Alexa and the door. When Irma told him she needed to use the bathroom, Jimenez forced her to urinate in a bucket in the room. He repeatedly threatened Irma and Alexa, telling them if they moved he would hit them with the curtain rod. Jimenez called Irma a "ho" and said he would "bring someone to fuck" her in front of Alexa. He also said that if the police came, Irma was "gonna get it even worse." He threatened to tie Alexa down to keep her in the room.

When Irma and Alexa tried to leave again, Jimenez jabbed Irma in the face with the curtain rod and told her to "shut the fuck up and sit down." Alexa said she needed to use the bathroom; Jimenez also told her to urinate in the bucket. She refused and tried to leave the room, but Jimenez grabbed her around the neck and tightened his grip. Alexa could not breathe but fought back by biting Jimenez on the arm. This caused Jimenez to release his grip, and he responded by punching her in the face. Alexa tried to escape through the window. Jimenez pushed her out, causing her to land awkwardly and painfully on her knees.

When she was able to stand, Alexa fled and hid across the street until she saw Jimenez leave. She then returned home, but minutes later Jimenez also came back. He continued to threaten Irma and Alexa, telling Alexa he would send someone to hurt her brother and kill her grandmother. Jimenez eventually left, and Irma and Alexa walked to a nearby restaurant to get something to eat. They then went to Irma's friend's house to borrow the friend's car, a Jeep.

Later in the day Irma returned home in the Jeep. Shortly thereafter Jimenez returned as well. He used his SUV to ram the Jeep. He then got out of his vehicle, picked up some rocks and threw them, breaking the back windows of the Jeep.

At some point Irma drove back to her friend's house and told her what had happened. The Jeep's bumper was damaged, the tail lights, side mirror, and two windows were broken, and rocks were inside the car. Around 4:30 p.m., Irma and her friend called the police. Irma was not sure where Alexa was at that point and told police she was worried that Jimenez had her. The police arrived around 8:00 p.m. As Irma recounted the events of the last 24 hours to San Diego Police Officer Jorge Ramirez, Jimenez drove by the house. Another officer at the scene, Scott Shaffer, jumped into his patrol car and pursued Jimenez with his lights and siren on. Jimenez evaded Shaffer, driving over the speed limit, running stop signs and a red light. Jimenez finally came to a stop in a commercial parking lot and was arrested.

While in jail awaiting trial, Jimenez made several telephone calls in which he made incriminating statements. He told his sister and another unidentified woman that his case was likely to get dismissed because Irma would not testify against him. When

his sister told Jimenez that "they" would keep Irma hidden, Jimenez told his sister to shut up. In a call with Jimenez's brother, the brother told Jimenez he had given Irma money. In telephone calls with Irma, Jimenez told her how much he loved her and promised he would change and arrange to get money for her. When Irma told Jimenez she wanted to visit him in jail, Jimenez discouraged her and told her the prosecution was looking for her.

At trial, Irma denied much of what she told police on the day Jimenez was arrested. She also sought to refute Alexa's trial testimony. Irma stated that the majority of what she told the police was exaggerated or made up because she was using drugs, and that she was the aggressor in her relationship with Jimenez.

At trial, the prosecution also introduced evidence concerning two prior, uncharged incidents of serious domestic violence. Alexa testified that in September 2014, she heard Jimenez beating her mother. Alexa called 911, but when the police arrived Irma denied anything had happened. After the police left, Jimenez again attacked Irma and when Alexa tried to stop him, Jimenez wrapped his hand around her neck and tightened his grip. Alexa again called 911. When the police arrived, Irma was bleeding and Alexa was taken to the hospital in an ambulance.

The second uncharged incident concerned Jimenez's ex-wife, with whom he shared a child. At trial, his ex-wife testified that after she left Jimenez in April 2005, Jimenez confronted her and tried to convince her not to leave. When she refused, Jimenez strangled her. Her next memory was waking up in the back seat of her car while

he was driving to a remote location. Thereafter, Jimenez parked the car, smashed the car's window with a rock, and threatened to kill her and her family if she left him.

At the conclusion of trial, the jury returned guilty verdicts on seven of nine counts: False imprisonment (Pen. Code, § 236, counts 3 and 7), criminal threat (§ 422, subd. (a), count 4), vandalism (§ 594, subd. (a), count 8), evading police (Veh. Code, § 2800.2, subd. (a), count 9), misdemeanor domestic battery (§ 243, subd. (e)(1), a lesser included offense of count 1), and misdemeanor child endangerment (§ 273a, subd. (a), a lesser included offense of count 6). The jury found Jimenez not guilty of count 5, which alleged Jimenez committed assault with a deadly weapon by using his SUV to hit the Jeep Irma was driving. The jury did not reach a verdict on count 2, which also alleged assault with a deadly weapon against Irma based on throwing the air conditioning unit through the window, and the prosecution dismissed the charge. Before sentencing, Jimenez admitted a prior serious felony conviction. The court sentenced Jimenez to a total prison term of 12 years and two months, including a five-year prison term for the prior serious felony conviction.

DISCUSSION

Unanimity Instruction

Jimenez first contends that the trial court erred by failing to give a unanimity instruction with respect to the crime of inflicting corporal injury on a spouse (§ 273.5, subd. (a)). The Attorney General concedes the trial court erred, but argues the error was not prejudicial. We agree.

A defendant's constitutional right to a unanimous jury verdict requires that when the evidence shows more than one unlawful act that could support a single charged offense, the prosecution must either elect which act to rely upon or the trial court must give a unanimity instruction telling the jurors they must unanimously agree which act constituted the crime. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) The unanimity instruction is designed to eliminate the danger that the defendant will be convicted even though there is no single offense that all the jurors agreed the defendant committed. (*Ibid.*)

No unanimity instruction is required, however, when the offense involves a continuous course of conduct; i.e., when the acts are "substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place[.]" (*People v. Champion* (1995) 9 Cal.4th 879, 932, internal quotes omitted.) The continuous conduct rule also applies when a defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for jurors to distinguish between them. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) "The primary significance of defining a crime as a continuous course of conduct is that the jury need not agree unanimously that the defendant committed any particular act or acts; it need only agree unanimously that he or she engaged in the prohibited conduct." (*People v. Culuko* (2000) 78 Cal.App.4th 307, 325.)

The elements of corporal injury on a spouse, section 273.5, subdivision (a), are:

- (1) The defendant intentionally and unlawfully inflicted a physical injury on his spouse,
- (2) the injury resulted in a traumatic condition, and (3) the defendant did not act in self-

defense. (*Ibid.*) Misdemeanor spousal battery (§ 243, subd. (e)(1)), of which Jimenez was ultimately convicted, is a lesser included offense of corporal injury on a spouse and does not require a finding that the injury resulted in a traumatic condition. (*Ibid.*) The continuous conduct rule exception to the unanimity instruction requirement has been applied to the crime of corporal injury on a spouse, but not to the lesser included offense of misdemeanor spousal battery. (See *People v. Thompson* (1984) 160 Cal.App.3d 220, 224.)

A split of authority exists on whether the standard of prejudicial error outlined in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) or that outlined in *People v. Watson* (1956) 46 Cal.2d 818 applies to a unanimity instruction error. (*People v. Smith* (2005) 132 Cal.App.4th 1537, 1545.) The majority of published California cases have applied the *Chapman* standard. (See *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 186-188 [applying *Chapman*]; *People v. Deletto* (1983) 147 Cal.App.3d 458, 472 [same]; but see *People v. Vargas* (2001) 91 Cal.App.4th 506, 562 [*Watson* standard applies]; and *People v. Curry* (2007) 158 Cal.App.4th 766, 783 [noting conflict].) Under *Chapman*, the failure to give a unanimity instruction is harmless " '[w]here the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that [the] defendant committed all acts if he committed any' " (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 577.)

We agree with the parties that the court's failure to give a unanimity instruction was error. The evidence that the prosecutor presented to prove the element of a traumatic

injury to Irma were cuts to her arms and legs and a mark on her nose, and the prosecutor told the jury that it could rely on evidence concerning all of the batteries Jimenez committed on Irma over the course of November 13 and 14 to convict him of corporal injury on a spouse. Had the jury found that the prosecution satisfied its burden to show a traumatic injury, such a finding could have been consistent with a continuous course of conduct causing such injury, and no unanimity instruction would have been required. (See *People v. Thompson, supra*, 160 Cal.App.3d at p. 224.)

The jury, however, *acquitted* Jimenez of inflicting a traumatic injury, finding instead only that Jimenez willfully and unlawfully touched Irma in a harmful or offensive manner, and that Jimenez was not acting in self-defense. Because the evidence showed that the various batteries committed by Jimenez against Irma occurred over two days, with a significant gap of time between the conduct on November 13 and the conduct the next day, a unanimity instruction was appropriate to safeguard against jury members basing their finding that Jimenez willfully and unlawfully touched Irma on different acts. (See *People v. Johnson* (2007) 150 Cal.App.4th 1467, 1477.)

Applying the *Chapman* standard, however, we conclude the error in this case was harmless beyond a reasonable doubt. As the Attorney General points out, Jimenez offered the same defense to all the crimes charged against him. He claimed, based on Irma's testimony, that Irma lied to police and that Jimenez did not abuse her and Alexa in the way that Alexa described. When confronted with her statements to the police by the prosecution, Irma claimed she was lying, under the influence of drugs and alcohol, and that she was the one who damaged the property. Irma's testimony was then impeached

with overwhelming evidence that Jimenez was the perpetrator of the charged crimes, including Alexa's testimony, testimony from the responding police officers that Irma did not appear to be under the influence of drugs or alcohol, jail calls showing his attempts to prevent Irma and Alexa from appearing at trial, and evidence of Jimenez's prior violent conduct against Irma, Alexa, and his ex-wife.

The jury's verdict, rejecting Irma's trial testimony version of the events, resolved the basic credibility dispute in favor of the prosecution. The jury convicted Jimenez of all of the charged crimes—except assault with a deadly weapon for the acts of ramming the Jeep with his car and throwing the air conditioner, and the prosecution's allegations that Irma and Alexa suffered traumatic injuries²—showing that the jury rejected Irma's denials and believed Alexa's version of events. Given this, a unanimity instruction would not have changed the outcome and the court's failure to give the instruction was harmless beyond a reasonable doubt. (See *People v. Thompson* (1995) 36 Cal.App.4th 843, 853 ["Where the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless."].)

² Further, the evidence concerning these exceptions was consistent with jury's verdict. There was no evidence that Irma was in the Jeep when Jimenez rammed it with his SUV, and the responding police officer testified at trial he did not recall seeing the traumatic condition (marks on Irma's nose and arms, and scratches on her legs) asserted by the prosecution at trial.

Lesser Included Offense Instruction

Jimenez was charged with and convicted of the felony false imprisonment of Irma. He asserts the trial court had a sua sponte duty to instruct the jury on the lesser included offense of misdemeanor false imprisonment.

Section 236 defines false imprisonment as "the unlawful violation of the personal liberty of another." Section 237 provides that punishment for false imprisonment may either be a fine not exceeding \$1,000, or imprisonment in the county jail for not more than one year, or both, except where such "false imprisonment [is] effected by violence, menace, fraud, or deceit." In such circumstances, false imprisonment is a felony and is punishable by imprisonment in the state prison. (§ 237.) Violence is defined as "the exercise of physical force used to restrain over and above the force reasonably necessary to effect restraint," and menace as "a threat of harm express or implied by word or act." (*People v. Babich* (1993) 14 Cal.App.4th 801, 806.)

The essential element of false imprisonment is restraint of the person. (*People v. Bamba* (1997) 58 Cal.App.4th 1113, 1123.) Any exercise of express or implied force that compels another person to remain where he does not wish to remain, or to go where he does not wish to go, is false imprisonment. (*Ibid.*) Misdemeanor false imprisonment becomes a felony where the force used is greater than reasonably necessary to effect restraint. (*Ibid.*) Where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense. (*People v. Greer* (1947) 30 Cal.2d 589, 596.) Misdemeanor false imprisonment is, therefore, a lesser included offense of the felony.

A trial court has a " 'sua sponte duty to instruct on a lesser included offense . . . if there is substantial evidence the defendant is guilty of the lesser offense, but not the charged offense.' " (*People v. Moye* (2009) 47 Cal.4th 537, 556.) However, " ' "if there is no proof, other than an unexplainable rejection of the prosecution's evidence, that the offense was less than that charged, such instructions [on lesser included offenses] shall not be given." ' " (*People v. Friend* (2009) 47 Cal.4th 1, 51-52.) In such a case, the jury is properly left with " 'an all-or-nothing choice,' " either the defendant committed the greater offense, or none at all. (*Id.* at p. 52.)

Here, the question is whether substantial evidence was presented to the jury from which it reasonably could have found that Jimenez unlawfully restrained Irma without violence or menace. Jimenez argues there was substantial evidence of the lesser included offense because the only evidence of physical force on November 14, 2015, was that he "poked [Irma] in the cheek with a pole after she started screaming at him for breaking the [iPad], but not in order to keep her in the room." He admits there was evidence he "threatened to harm [Irma's] family if she were to leave him," but contends the threat was not made to restrain her. Jimenez also admits "he arguably used more force than was reasonably necessary to restrain Alexa when he grabbed her by the neck and punched her as she tried to leave the room, and told Irma he would tie her down to make her stay."

Jimenez's admissions show that under no view of the evidence was he guilty of false imprisonment without violence or menace. He concedes that he used more force than necessary to restrain Alexa and the evidence is not disputed that this took place in front of Irma. He further admits he threatened Irma's family. That Jimenez now argues

he only did so to prevent Irma from leaving their relationship does not negate the fair inference that the threats were menacing. Moreover, the evidence showed Jimenez threatened Irma physically by using the curtain rod to destroy property and batter Irma, and by standing between the victims and the bedroom door.

Jimenez's defense was that he did not hold Irma hostage and instead Irma was responsible for the property damage. This evidence left no room for the jury to convict Jimenez only of misdemeanor false imprisonment. Either Jimenez physically and verbally threatened Irma to prevent her from leaving, or he did not imprison her at all. Accordingly, the court did not have a duty to instruct on the lesser included offense.³

Senate Bill No. 1393

On September 1, 2018, after briefing in this appeal was completed, the Governor signed Senate Bill No. 1393 into law. (Stats. 2018, ch. 1013.) The new law took effect on January 1, 2019 and amends sections 667, subdivision (a) and 1385 to give trial courts discretion at sentencing to strike or dismiss five-year prior serious felony enhancements in "furtherance of justice." (*Id.* at §§ 1-2.) We filed our initial opinion in this case on October 23, 2018 affirming the trial court's judgment. One week later, Jimenez brought a petition for rehearing asserting that remand for resentencing is warranted under the new

³ Jimenez relies on *People v. Castro* (2006) 138 Cal.App.4th 137 to support his assertion that the facts were sufficiently ambiguous to require an instruction on the lesser included offense. His reliance is misplaced. *Castro* involved a concession by the People, which the court of appeal accepted, that an instruction on misdemeanor false imprisonment as a lesser included offense of *kidnapping* was warranted where the defendant grabbed the victim by the arm and pulled her several feet before escaping. (*Id.* at p. 144.) *Castro* has no bearing on whether there was substantial evidence to mandate the instruction here.

law because his case had not yet become final. The Attorney General opposed the petition, asserting Jimenez was precluded under California Rules of Court, rule 8.268 from raising this new issue in a petition for rehearing and that rehearing was not warranted because the law had yet to take effect. We rejected the Attorney General's arguments, granted the petition and provided the parties with the opportunity to file additional briefing.

In his supplemental brief, the Attorney General concedes that the ameliorative changes to sections 667 and 1385 made by Senate Bill No. 1393 apply retroactively to all non-final cases, including this one. Further, the Attorney General acknowledges that remand is warranted here because the trial court stated explicitly it lacked discretion to strike the prior serious felony enhancement and did not provide any indication as to whether it would have imposed the enhancement if it had discretion not to do so. We agree and accept the Attorney General's concessions. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 971-972 [holding that because Senate Bill 1393 vests the trial court with discretion to impose the same or a lesser penalty, it "applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided the judgment of conviction is not final" on the effective date of the legislation.].) Accordingly, Jimenez is entitled to a limited remand.

DISPOSITION

The cause is remanded to allow the superior court to exercise its discretion to decide whether to strike the five-year enhancement for Jimenez's serious prior felony

under new amended section 667, subdivision (a). In all other respects, the judgment is affirmed.

DATO, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.